

Background of New Hampshire MS4 General Permit Dispute

- EPA signed the final New Hampshire Small Municipal Separate Storm Sewer System (MS4) permit on January 18, 2017. The permit, response to comments, and other supporting materials are posted on Region 1's website. https://www3.epa.gov/region1/npdes/stormwater/MS4_NH.html The signed prepublication FR notice of availability of the permit is also posted on the website and states that parties have 120 days to seek judicial review beginning February 1.
- The permit covers municipal stormwater discharges from New Hampshire municipalities. Municipalities can elect coverage under this general permit or may request an individual permit.
- EPA took comments on the draft permit from February 12 to August 15, 2013 after two comment period extensions. In 2015, EPA edited select sections of the 2013 draft permit and reopened these sections for comment from September 1 to November 2, 2015. EPA then took comments on the comments received during the last comment period until November 20, 2015.
- Commenters included MS4 operators, local watershed groups, lawyers representing MS4 operators, environmental non-profit groups, and citizens. Commenters expressed a variety of views on the individual requirements of the permit, their flexibility, feasibility, protectiveness, and affordability. EPA has responded to all comments.
- The conditions in the general permit are established pursuant to Clean Water Act (CWA) section 402(p)(3)(B)(iii) to ensure that pollutant discharges from small MS4s are reduced to the Maximum Extent Practicable (MEP), protect water quality, and satisfy the appropriate requirements of the CWA.
- EPA received state CWA § 401 water quality certification for the General Permit from the New Hampshire Department of Environmental Services (NHDES), as well as federal consistency determinations from the National Marine Fisheries Service, U.S. Fish and Wildlife, and the New Hampshire Coastal Zone Management office.
- EPA Region 1 issued a similar Massachusetts Small MS4 general permit in April 2016. A consolidated appeal from multiple petitioners, including the Center for Regulatory Reasonableness, Conservation Law Foundation, Massachusetts Coalition for Water Resources Stewardship, National Association of Homebuilders, and two Massachusetts municipalities is pending in the U.S. Court of Appeals for the District of Columbia. A briefing schedule has not been set.

Use of ADR for MS4 Permit Issues

For EPA purposes, ADR is the use of mediation (use of a mediator to assist the parties in coming to an agreement). The mediator does not issue any findings or decisions.

- ADR is voluntary. Each of the parties to a dispute must be interested in exploring the possibility of resolving a dispute with the process assistance of a mutually acceptable mediator. Any party can withdraw from the process at any time during the process. Each of the parties has to weigh the incentives and disincentives of dialogue against their other legal and procedural options.

- ADR should involve all affected parties who would need to participate in resolving the issues and implementing the solution. ADR generally involves representatives of the clients in addition to the attorneys of record.
- ADR discussions for settlement are confidential, unless there is a need to have a more public dialogue process.
- ADR is a phased process.
 1. The first step is for an EPA CPRC mediator to contact each of the parties separately and confidentially to determine whether they believe that participating in an assisted negotiation process is in their interests.
 2. If each of the parties is willing, CPRC works with the parties to identify and retain a mutually acceptable third party mediator. We have a national contract vehicle that the parties can use to identify and retain the mediator. Funding is provided by the EPA client office. In some cases funding of the mediator's fee can be shared among the parties to the mediation.
 3. Once the parties have worked through the mediator selection process, the mediator works with each party separately and confidentially to design a process that the parties feel can be accomplished in a fair and timely manner.
 4. The parties generally work with the selected mediator to enter into a mediation agreement which sets out the roles of each party, timelines and a general design for the mediation process.
 5. The parties, working with the mediator, work through the discussion and resolution of the issues. The mediator may assist in drafting up a single text agreement or may advise the parties in drafting up an agreement themselves.

Many elements of entering into an ADR process are the same whether the process is conducted pre-litigation or while litigation is on-going.

- If litigation is on-going, the parties may need to consider Federal Court mediation rules or procedures and jointly work through litigation deadlines with each other and the Court.
- If mediation is conducted in a case in federal court, the Department of Justice may have resources to pay part or all of the mediator's fee.
- If the ADR process is pre-litigation it can be designed either as private pre-settlement discussions, or a more public dialogue, depending on the needs of the parties and the specific issues under consideration.